IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 866 OF 1994

1. Ramlakhan R. Mourya
2. Ramshrya R. Mourya
3. Ramkishor R. Mourya ..Appellants
(Ori.Defendants)

versus

Rohington Faradoon Deoliliwalla ..Respondent
(Ori. Plaintiff)

Mr. P. N. Joshi for the Appellants.
Mr. Yatin Shah for the Respondent.

CORAM : D. G. DESHPANDE,J.

DATE : 1ST MARCH,2005

ORAL ORDER :

1. Heard counsel for the appellants and the respondent.

2. Appellants are the original defendants against whom a decree for specific performance has been passed by the IInd Joint District Judge, Senior Division, Nashik dated 23.3.1994.

3. Appellants - defendants were the owners of

the property. They entered into an Agreement for sale with the plaintiff - respondent dated 24.1.1989, the consideration that was fixed was Rs.2,04,000/- out of which Rs.1 lac was paid by the plaintiff to the defendants - appellants and this agreement provided the defendants to seek permission from the concerned Authorities and the date of sale deed was fixed as 30.6.1989. It was the case of the plaintiff that the defendants did not seek necessary permission, they therefore gave public notice as well as private notice in March 1991. The defendants did not come forward to execute the sale deed and therefore the plaintiff was required to file the suit for specific performance. The defence of the defendants was that there was delay on the part of the plaintiff in performing his part of the agreement. Secondly, the plaintiff was not in a financial position to pay the balance of consideration. Thirdly, the defendants had on 3.4.1991 gave a notice to the plaintiff calling upon him to execute the sale deed by paying the balance of consideration, plaintiff was also warned that if he do not get the sale deed executed the agreement would stand cancelled and therefore according to the defendants since the plaintiff did not come to execute the sale deed, the defendants again entered into an agreement with third party in February 1992 and put the third party in possession. Therefore,

according to the defendants when the suit came to be filed the defendants ceased to be the owners of the property and ceased to have any control over it. Third party was not joined as party to the suit. It was also the case of the defendants that they were in need of money when they entered into an agreement, they required money to complete some other transaction but because of the failure of the plaintiff to pay the balance of consideration within time, the defendants could not complete their other transaction. In short, according to the defendants time was the essence of the agreement.

4. The Court accepted the case of the plaintiff and rejected the defences and passed a decree and therefore this Appeal.

5. Counsel for the appellants contended that firstly plaintiff is not entitled to the relief of specific performance because in the plaint there are no pleadings about readiness and willingness of the plaintiff. Secondly, plaintiff did not perform his part of the agreement, Thirdly even though there was a stipulation in the agreement that the defendants should obtain permission from the concerned Authorities, the defendants were not required to obtain any such permission. Fourthly, the plaintiff was heavily indebted to banks and therefore he was

not in a position to pay the balance of consideration and then appellants themselves had given a notice dated 3.4.1991 and then entered into an agreement with the third party and placed the third party in possession. Therefore, according to him for all these reasons the decree was liable to be set aside and the suit was liable to be dismissed.

6. Counsel for the appellants relied upon the three following judgments of the Supreme Court

1) AIR 2003 Supreme Court 1391 Manjunath Anandappa Urf Shivappa Hansi vs. Tammanasa and others.

2) (1995) 5 Supreme Court Cases 115 N. P. Thirugnanam (Dead) by LRs. vs. Dr. R. Jagan Mohan Rao and others.

3) AIR 1996 Supreme Court 2095 His Holiness Acharya Swami Ganesh Dassji vs. Sita Ram Thapar

All to show that it was for the plaintiff to plead readiness and willingness to prove the same in the court by proper, convincing and cogent evidence.

7. It has to be seen whether the plaintiff has made out a case in this regard. The first thing that strikes me after hearing the counsel for the appellants, is that the appellants have come up with a totally false evidence just to avoid liability of completing the sale deed. In the said agreement there is specific mention that the appellant has placed the purchaser in possession of the property consistent with this the plaintiff in the plaint has prayed that the appellants be restrained from interfering with his possession. Therefore even though there is a specific averment in the suit agreement about placing the plaintiff in possession of the property the defendants - appellants wants the court to believe that in fact they did not hand over possession of the property to the plaintiff, though the property was in their possession and that they handed over possession of the the property to the third party when they entered into an agreement in February 1992. This is therefore a case where the defendants has contradicted his own documents obviously for the reasons to nullify and frustrate the claim of the plaintiff. The person who is raising the contradictory pleas, resile from the documents and agreement, cannot be believed, and the documents has to be taken as it is.

8. Counsel for the appellants contended that if the court has passed a decree of possession in favour of the plaintiff, it would show that the plaintiff was not in possession. This argument cannot be accepted. The prayer of the plaintiff is absolutely clear, he has not asked the court to place him in possession of the property. He has asked that his possession be protected. This plea is consistent with the averments in the said agreement. It might be that the court without properly understanding the prayer of the plaintiff ordered that the plaintiff be placed in possession but that wrong can be corrected by this court in Appeal and plaintiff's possession will have to be protected if he succeed in proving that claim and contention of the defendants are false.

9. It was also vehemently urged by the counsel for the appellants that the plaintiff did not perform his part of the agreement. Counsel for the appellants was asked by me what the plaintiff was supposed to do in order to perform his part. I did not get any satisfactory answer in that regard. The Plaintiff has already paid about half amount of the consideration to the defendants at the time of agreement. He was placed in possession of the property and he was in possession. In fact it was not necessary at all for the plaintiff to file a

suit for possession because he was parted in possession in part performance, he could have defended his possession even as against the defendants - appellants under Section 53A of the Transfer of Property Act. However, in order to get title to the property had filed a suit, nothing was required for the plaintiff in that case but to make the payment as and when ordered by the court and therefore there is no substance in the contention of the appellants that the plaintiff did not perform his part of the agreement.

10. Next it was contended and indirectly tried to be suggested that the time was the essence of the agreement. This contention has to be negatived at its threshhold. It is not the case of the defendants in the written statement that the time is essence of the contract. It was not mentioned that the parties wanted time to be made essence of the agreement merely fixing the date of the execution of the sale deed does not make the time essence of the contract. There has to be special averment in that regard and circumstances showing that was the intention of the parties have to be pleaded by the plaintiff in defence. Nothing has been done by the defendants. It was tried to be suggested that because the plaintiff did not complete his part of the agreement, the defendants could not complete

some other transaction, this is a far fetched argument without any factual basis to that. If at all the defendants was in dire need of money to complete some transaction, there is no explanation why he waited till April 1991 in giving their notice, there is also no explanation why 10 months thereafter they entered into agreement with the third party in February 1992. These facts brought on record, do not at all suggest that intention of the parties was to make the time essence of the agreement. They do not show that the defendants wanted to complete some other transaction after receiving money or consideration from the plaintiff.

11. The plaintiff has given public notice and also given an individual notice to the defendants in March 1992. There are specific averments in that regard in the plaint about issuance of public notice, and about sending individual notice to the defendants. To that the claim of the defendants in the written statement is of simple denial. The allegations of the plaintiff about notice are there in paragraph 6 of the plaint and in reply to that the defendants in paragraph 7 of the written statement has averred as : **"These defendants deny any knowledge of the alleged Public Notice dated 6.3.92. Nor did the defendants receive any personal notice dated 11.3.92."** It is easy to deny receipt of

individual notice. But the denial of knowledge of the public notice, is obviously tented with malafides and it is not bonafide or factual assertion.

12. Counsel for the appellants also contended that the plaintiff was not in financial position to pay the amount as he was heavily indebted to other banks. It is true that the plaintiff has admitted that there was a claim against him running between Rs.20 to 24 lacs of a particular bank, but in the same paragraph of deposition he has specifically asserted that he was in a position to complete the sale deed. This will clearly show that even though the plaintiff was indebted but that was not going to affect his capacity to pay remaining amount of consideration to the defendants.

13. Now coming to the judgments relied upon by counsel for the appellants, judgment reported in **(1995)5 Supreme Court Cases 115 N.R. Thirugnanam (Dead) by LRs vs. Dr. R. Jagan Mohan Rao Ors.,** is of relevance in the instant case, in which it is held by the Supreme Court :

> **"The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific**

> **performance. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."**

From the aforesaid judgment, it is clear that inference of readiness and willingness can be drawn by the court on the basis of the pleadings and the circumstances brought on record. In the instant case the conduct of the plaintiff, viz. his paying

one half of the consideration at the time of agreement, he is being placed in possession pursuant to the agreement, his giving notice public as well as individual notice in respect of the suit transaction, and service of the notice with acknowledgement proved, as against the bare daring denial of the defendant about receipt of the notice and willingness shown by the plaintiff to perform his part, as against this the conduct of the defendants in entering into agreement with some one else and contending that third party has been placed in possession, which was in total contradiction of the suit agreement, are all circumstances leaning in favour of the plaintiff. Grant of specific performance is an equitable relief and the party whose case is found to be false and contradictory to the document is not entitled to any consideration from the court. The trial court has rightly decreed the suit. No interference is called for.

14. In the Result, I pass the following order :

ORDER

. Appeal is dismissed.

. Appellants will be entitled to withdraw the amount deposited by them.

1.03.2005 (D.G. DESHPANDE, J.)